(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: MAY 14 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition and dismissed the subsequent motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a bank. It seeks to permanently employ the beneficiary in the United States as an operations research analyst. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1]

As required by statute,[2] the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is November 12, 2008.[3]

At issue on appeal is whether the petitioner has possessed the continuing ability to pay the proffered wage of the offered position from the priority date. The AAO will also consider whether the beneficiary meets the minimum requirements of offered position and the requested advanced degree professional classification.[4]

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[5]

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[1] Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States.

[2] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

[3] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

[4] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

[5] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

I. FACTUAL AND PROCEDURAL HISTORY

On November 12, 2008, filed a labor certification on behalf of the beneficiary for the position of operations research analyst.

On , was closed by the and Finance as a failed bank, and the Federal Deposit Insurance Corporation (FDIC) was named receiver for the institution.[6] To protect the depositors of , the FDIC entered into an agreement with the petitioner whereby the petitioner acquired the banking operations of The At the time of the transfer, The had 14 branches, assets of million and deposits of million. The estimated cost to the FDIC Deposit Insurance Fund for this transaction was million.

On November 18, 2010, the DOL approved the labor certification filed by . On February 8, 2011, the petitioner filed the instant petition based on that labor certification.

The director denied the petition on November 22, 2011 and the subsequent motion to reopen and reconsider on February 7, 2012.

The director's decision dismissing the motion concludes that the petitioner failed to establish ability to pay the proffered wage in 2008 and 2009, and its ability to pay the proffered wage in 2010 and 2011.

The petitioner appealed the director's decision to the AAO on March 23, 2012. The brief in support of the appeal states that the director misrepresented its financial condition by using the incorrect entries on its financial reports. The brief also states that the director partially based its decision on negative information pertaining to a completely unrelated entity. Finally, citing *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm'r 1967), the brief states that, when considering the totality of the circumstances, possessed the ability to pay the proffered wage in 2008 and 2009.

II. LAW

As is noted above, the petitioner is a different entity than the employer named on the labor certification. A labor certification involving a specific job offer is valid only for the particular job opportunity stated on the labor certification application form. 20 C.F.R. § 656.30(c)(2). If the petitioner is a different entity than the employer named on the labor certification, then it must establish that it is a successor-in-interest to the labor certification employer. *See Matter of Dial Auto*

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[6] The information in this paragraph was obtained from the FDIC Press Release *Institutions*, which the petitioner submitted into the record of proceeding. This press release is also available at

19 I&N Dec. 481 (Comm'r 1986). Pursuant to an inter-agency agreement between the DOL and legacy Immigration and Naturalization Service (INS), the DOL delegated to INS the authority to amend certain employer-related information on approved labor certifications and to determine if a petitioner is a successor-in-interest to the employer named on the labor certification.[7]

A valid successor relationship may be established for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must demonstrate that it is eligible for the immigrant visa in all respects.

The first two conditions are not at issue on appeal. The evidence in the record of proceeding documents the petitioner's acquisition of and establishes that the job opportunity with the petitioner is the same as originally offered on the labor certification. It is the third condition that is the subject of this appeal.

The third condition includes, *inter alia*, establishing the ability to pay the proffered wage. The petitioner must establish that its job offer to the beneficiary is a realistic one. The ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The regulation 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's

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[7] *See* DOL Field Memorandum No. 47-92, *Amending Labor Certification Applications,* on July 14, 1992 (57 FR 31219). The memorandum states that "[t]his agreement was entered into because of INS's extensive experience in determining whether an entity is the same employer after a change such as a sale, merger or reorganization."

proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

Further, in a successor-in-interest case, the petitioning successor must establish the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner's total exceeded the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the

> allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[8]

Finally, USCIS may also consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the

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[8]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

III. ANALYSIS

As is explained above, the petitioner must establish that ' possessed the ability to pay the proffered wage from the November 12, 2008 priority date until September 17, 2010, the date it was acquired by the petitioner; and the petitioner must also establish its ability to pay the proffered wage from September 17, 2010 onwards.

The proffered wage stated on the labor certification is $61,000 per year. On the petition, the petitioner claimed to have been established in 1926, to have a gross annual income of and to employ 600 workers.[9]

On the labor certification, the beneficiary claimed to have been employed in the offered position by from May 1, 2008. Although the director requested copies of the beneficiary's Forms W-2 as evidence of her employment with nd the petitioner, the petitioner did not submit these documents. The petitioner also failed to provide these documents on appeal.

The net income of The People's Bank and the petitioner are set forth below:[10]

Year	Name	Net Income
2008		-$ 6,104,000
2009		-$24,158,000
2010		$17,410,000
2011		$ 9,969,000

Therefore, the director's conclusion that the petitioner did not possess the ability to pay the proffered wage in 2010 and 2011 is withdrawn.

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[9] According to its website, the petitioner was founded on January 29, 2010. *See* Further, the petitioner's name is ' which is the name provided on the petition and on the Forms G-28 submitted with the petition and the appeal.

[10] The financial information in this chart is from the financial reports maintained by the FDIC for banking institutions. These reports can be viewed at

The petitioner does not claim that possessed positive net current assets in 2008 or 2009, nor do the submitted financial reports provide a net current assets calculation.

Therefore, for 2008 and 2009, the petitioner has not established that possessed the ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, net income and net current assets.

On appeal, the petitioner claims that USCIS should consider the magnitude of the petitioner's business activities, its longevity, and its history of profitability. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioner also claims that financial problems were caused by the global financial crisis.

As is mentioned above, when determining the ability to pay the proffered wage, USCIS will consider the totality of the circumstances. The AAO notes that had been in business since the record contains evidence of a history of profitability prior to 2008; at the time it was acquired by the petitioner, it had branches, assets of and deposits of and it had approximately 150 employees.

However, suffered large losses in 2008 and 2009. In 2010 it was closed by the as a failed bank, it was placed into receivership with the FDIC, and it was acquired by the petitioner. This transaction resulted in an estimated in losses to the FDIC Deposit Insurance Fund. Under these facts, the AAO cannot conclude that The possessed the ability to pay the proffered wage from the priority date until it was acquired by the petitioner. The petitioner's claim that financial difficulties were caused by the global financial crisis does not change this conclusion.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established the continuing ability to pay the proffered wage from the priority date.

Beyond the decision of the director, the petitioner has also failed to establish that the beneficiary met the minimum requirements for the requested preference classification and the offered position.

As is noted above, the petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Act. The regulation at 8 C.F.R. § 204.5(k)(2), defines "advanced degree" as follows:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

The evidence in the record establishes that the beneficiary possesses the foreign equivalent of a U.S.

bachelor's degree. Therefore, in order to be classified as an advanced degree professional, the beneficiary must possess at least five years of progressive experience in the specialty.

In addition, the petitioner must also establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981). In the instant case, the labor certification states that the offered position requires a master's degree or, in the alternative, a bachelor's degree and five years of experience in the same occupation of the offered position. Since the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree, in order to meet the requirements of the labor certification, the beneficiary must possess five years of experience by the priority date of the petition.

The labor certification states that the beneficiary was employed as an operations research analyst by from January 23, 2003 until April 30, 2008.[11]

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(g)(1).

The record contains a letter on what purports to be letterhead. The letterhead does not appear to be official. The letter, dated December 16, 2010 and signed by , states that the company employed the beneficiary as an operations research analyst from January 2003 until April 2008. However, the letter does not provide the title of the person signing the letter or provide an address or any contact information for the employer. Therefore, the submitted employment experience letter does not meet the regulatory requirements of 8 C.F.R. § 204.5(g)(1).

Further, on October 31, 2007, sold its banking operations and re-named the company (Therefore, a letter dated

[11] The labor certification states that the beneficiary had been employed by in the offered position starting May 1, 2008. However there is no documentary evidence of this employment in the record of proceeding. In addition, Part J. 21 of the labor certification states that the beneficiary did not obtain any of the qualifying experience for the offered position in a substantially comparable position with Finally, even if the AAO accepted this experience, it would only constitute approximately six months of employment experience prior to the November 12, 2008 priority date.

December 16, 2010 should be on letterhead, not letterhead. In addition, since transitioned "from a financial services company operating retail branches in to a pure technology, processing, and network company" starting on October 31, 2007,[12] it is unclear how the beneficiary performed the banking-related duties stated on the labor certification and experience letter with until April 30, 2008. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Therefore, it is also concluded that the petitioner failed to establish that the beneficiary possessed five years of experience in the job offered as required by the terms of the labor certification and the requested preference classification.

IV. CONCLUSION

The petitioner failed to establish that had the ability to pay the proffered wage from the priority date until the date that the petitioner acquired its banking operations. The petitioner also failed to establish that the beneficiary possessed the minimum requirements of the offered position as set forth on the labor certification and for classification as an advanced degree professional.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

[12] *See* http://chexar.com/224-banuestra-financial-corporation-completes-rebranding.